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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SUNSHINE ENTERPRISES LP, Plaintiff and Appellant, v. CALIFORNIA COASTAL COMMISSION. Defendant and Respondent.	B284459 (Los Angeles County Super. Ct. No. BS158638)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Gaines & Stacey, Sherman L. Stacey and Rebecca A. Thompson for Plaintiff and Appellant

Xavier Becerra, Attorney General, Daniel A. Olivas, Assistant Attorney General, and Mitchell E. Rishe, Deputy Attorney General, for Defendant and Respondent

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In 2009, Sunshine Enterprises applied to the California Coastal Commission (the Commission) for a permit to demolish two low-cost motels in downtown Santa Monica and replace them with a limited-amenity, moderately-priced Travelodge Hotel. Before applying to the Commission, Sunshine Enterprises obtained approval from the City of Santa Monica (the City) for the hotel, including an incentive allowing the hotel to block ocean views, because the proposed hotel would provide affordable accommodations in an area where such accommodations were in dwindling supply. The Commission then approved Sunshine Enterprises' permit application on that same basis. However, Sunshine Enterprises never completed the permit's prior-to-issuance conditions. As a result, the Commission never issued the permit, which eventually expired. Nevertheless, Sunshine Enterprises demolished the two low-cost motels and built a luxury boutique hotel in their place.

In 2013, Sunshine Enterprises requested that Commission staff issue the expired permit. The staff advised Sunshine Enterprises to seek after-the-fact approval for the hotel. However, the Commission ultimately denied the permit application after finding that the fee Sunshine Enterprises had previously paid to the City was inadequate to mitigate the hotel's impact on the supply of lower-cost accommodations in the area. Sunshine Enterprises then filed a petition for writ of mandate to set aside the Commission's decision to deny the permit. The trial court held that substantial evidence supported the Commission's decision to deny Sunshine Enterprises' after-the-fact permit application as inconsistent with the Coastal Act. We affirm.

FACTUAL BACKGROUND

On March 4, 2009, Sunshine Enterprises informed the Commission that it planned to demolish two aging, low-cost motels it owned in downtown Santa Monica and had hired PKF Consulting to advise it on the type of hotel to build in place of the low-cost motels.[1] Sunshine Enterprises told the Commission it had "elected to pursue a replacement moderately-priced Travelodge rather than yet another new luxury hotel" and that it had made this decision "even though PKF concluded that a luxury hotel would be more profitable than a moderately priced Travelodge."

When Sunshine Enterprises applied to the City for local approval, City Planning Division Manager Amanda Schachter noted that the proposed hotel would block ocean views from public viewing decks located at the Santa Monica Place mall, and thus conflicted with the City's land use plan. However, in exchange for Sunshine Enterprises' promise to build a moderately-priced hotel, City staffers would recommend amending the land use plan to remove the viewing platforms from the plan. "While the proposed project would result in the loss of scenic views of the ocean from the third floor publicly accessible viewing decks located on the west side of Santa Monica Place, . . . the significance of this resource has been diminished over time both in terms of the extent of the view and its utilization," Schachter noted. Further, it was not feasible to

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[1] Before 2010, the motels were owned by Ocean Avenue Management. The beneficial owners of Ocean Avenue Management are the same as the owners of Sunshine Enterprises.

reduce the size of the proposed project, which would necessarily cut the number of hotel rooms, and still retain the project's relative affordability. Therefore,"[t]he proposed project's benefit of providing moderately-priced visitor-serving lodging near the coast outweighs the loss of this diminished ocean view."

In approving the proposed project, however, the City made clear that it was "approving the Travelodge Hotel as a low cost lodging facility." To that end, the City imposed a condition on the project, which provided that should "any of the low cost rooms cease to be low cost lodging, including if the room has become higher cost lodging or converted to another use, [Sunshine Enterprises] shall pay a mitigation fee pursuant to [City] Ordinance 1516."[2] At the time, the average daily room rate for low cost lodging was $172.27.

On March 5, 2009, Sunshine Enterprises applied to the Commission for a coastal development permit to demolish the two existing motels and build a single 164-room "limited-amenity moderate[ly] priced Travelodge Hotel" consistent with its approval from the City. The application stated that the project would "replace and increase the number of affordable moderate[ly]-priced guestrooms from 87 to 164, which is much needed and preferred use in the coastal zone." In its report to the

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[2] The purpose of City Ordinance 1516 was to "reduce the negative impact on affordable visitor accommodations caused by new commercial and new hotel and motel development which requires demolition of exiting visitor accommodations." To that end, the ordinance imposed a fee to "help diminish the overall loss of low cost lodging accommodations in the City and to mitigate the adverse consequences of removal of low cost lodging accommodations in the Coastal Zone."

Commission, staff noted that, based on a survey of hotels within the City's coastal zone, it was evident there was a shortage of low and moderate priced overnight accommodations within this area. The staff report recommended that the Commission approve the coastal development permit subject to five special conditions, as well as five standard conditions.

Special condition 1 required Sunshine Enterprises to obtain a new or amended coastal development permit should the project "change in the density or intensity of [land use], or change from the project description" of a moderately priced Travelodge hotel. However, the staff report noted, such a change was unlikely given that "the hotel will not be easily converted to a luxury or high end hotel without major modifications, which will need to be reviewed and approved by the City and Coastal Commission." Special conditions 2, 4 and 5 were "prior-to-issuance" conditions and required completion before a coastal development permit would issue and development could lawfully commence. Standard condition 2 provided that the permit would expire if development did not begin within two years or the applicant did not apply for an extension prior to the expiration date.

On June 11, 2009, the Commission approved the proposed project and adopted the staff report in its entirety, including the special conditions. On June 18, 2009, the Commission issued a notice of intent to issue permit. The notice expressly stated that this was not a coastal development permit and warned Sunshine Enterprises that the Commission would not issue the permit until Sunshine Enterprises satisfied each of the prior-to-issuance special conditions. To that end, the Commission informed Sunshine Enterprises: "The Commission's approval of the [permit] is valid for two years from the date of approval. To

prevent expiration of the [permit], you must fulfill the 'prior to issuance' Special Conditions, obtain and sign the [permit], and commence development within two years of the approval date . . . . You may apply for an extension pursuant to the Commission's regulations at [California Code of Regulations], title 14, section 13169." A Sunshine Enterprises representative signed the notice of intent, acknowledging that it fully understood its contents, including all conditions imposed.

Sunshine Enterprises did not fulfill all of the Commission's prior-to-issuance special conditions within the two-year deadline and did not file for an extension before the deadline. Therefore, the Commission's approval expired and no permit was issued. Nevertheless, Sunshine Enterprises demolished the two low-cost motels and built a new hotel in their place.[3] However, Sunshine Enterprises did not build the "limited amenity moderate[ly] priced Travelodge Hotel" the Commission had approved. Instead, it built a self-described "luxury boutique hotel," called the Shore Hotel.

As noted above, when approving the proposed project, the City had imposed a condition providing that should "any of the low cost rooms cease to be low cost lodging, including if the room has become higher cost lodging . . . [Sunshine Enterprises] shall pay a mitigation fee pursuant to [City] Ordinance 1516." In accordance with this condition, the City informed Sunshine

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[3] Although Sunshine Enterprises never received a confirmation from the Commission that a permit had been issued, it proceeded with both demolition and construction claiming a mistaken belief that the Commission must have simply transmitted the permit directly to the City without informing Sunshine Enterprises.

Enterprises in September 2013 that the Shore Hotel's average daily room rates had exceeded the authorized rate for low cost lodging and it was required to pay an affordable lodging mitigation fee. Sunshine Enterprises paid the City a $1,211,688 mitigation fee, which had been calculated by the City at $16,829 per room for the 72 lost lower-cost rooms. However, the City warned Sunshine Enterprises that it should also contact the Commission because the Commission's prior approval contained its own affordability requirements. In other words, because the project was under the concurrent jurisdiction of the City and the Commission, "the elimination of the low cost lodging at the Shore Hotel through the payment of this fee also requires review by the . . . Commission."

In November 2013, well after Sunshine Enterprises had demolished the two low-cost motels and built a new luxury hotel, Sunshine Enterprises requested that the Commission issue a coastal development permit. Because the Commission's prior 2009 approval had expired without the issuance of a permit, Commission staff advised Sunshine Enterprises to seek after-the-fact authorization for the demolition of the prior motels and construction of the new hotel.[4] Commission staff also

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[4] Fees for an after-the-fact permit application are five times the original amount although that increase may be reduced if the after-the-fact permit application can be processed by staff without significant additional review time (as compared to the time required for the processing of a regular permit), or the owner did not undertake the development for which the owner is seeking the after-the-fact permit. However, in no case shall the reduced fees be less than double the original amount. (Cal. Code Regs., tit. 14, § 13055, subd. (d)(1)-(2).)

recommended that Sunshine Enterprises' permit application contain "necessary conditions to limit or mitigate impacts to coastal resources, such as public access to the coast." Despite this recommendation, Sunshine Enterprises applied for approval of its prior demolition of the low-cost motels and construction of the already-built luxury hotel without addressing mitigation of the hotel's impact on coastal resources.[5]

At the Commission's hearing on Sunshine Enterprises' after-the-fact permit application, the Commission determined that the $1,211,688 mitigation fee Sunshine Enterprises had already paid to the City was insufficient to fully mitigate the impacts to the lost lower-cost accommodations because the City's formula in Ordinance 1516 was "outdated." Moreover, because the City did not have a certified local coastal program, the City's mitigation fee did not "represent compliance with Chapter 3 policies of the Coastal Act." Although Commission staff had recommended an additional mitigation fee, the Commission did not ultimately determine what an appropriate mitigation fee would be, as Sunshine Enterprises "strongly opposed any additional in-lieu fees."[6] After a hearing on the matter, the

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[5] Sunshine Enterprises' 2009 permit application was numbered "CDP 5-09-040" while its 2015 after-the-fact permit application was numbered "CDP 5-15-0030."

[6] The Commission's staff recommended approval of the permit on condition that Sunshine Enterprises pay a total of $4,001,400 in mitigation fees, with credit for the $1,211,688 it had already paid to the City. According to Sunshine Enterprises, this recommendation followed the Commission's practice of using "in lieu" fees to mitigate the loss of affordable overnight accommodations in the coastal zone.

Commission denied Sunshine Enterprises' permit application because, as proposed, "it did not conform with the Coastal Act's mandate to preserve, provide and encourage low cost, overnight accommodations." On November 5, 2015, Sunshine Enterprises filed a petition for writ of mandate to set aside the Commission's decision to deny the after-the-fact permit and to order that the Commission approve the permit.[7] Trial took place on June 1, 2017.

TRIAL COURT OPINION

The trial court held that substantial evidence supported the Commission's decision to deny Sunshine Enterprises' after-the-fact permit application as inconsistent with the Coastal Act because: (1) the project did not provide lower-cost accommodations, did not provide evidence that lower-cost

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[7] On June 29, 2018, the Commission filed a request for judicial notice of court documents showing that on March 27, 2015, Sunshine Enterprises filed a petition for writ of mandate in a separate action to compel the Commission to issue and amend the expired 2009 coastal development permit. On May 10, 2017, Sunshine Enterprises dismissed the separate action case with prejudice. According to the Commission, by dismissing its case, Sunshine Enterprises conceded that its demolition of the two low-cost motels, and its construction and operation of the luxury Shore Hotel, was unpermitted development in violation of Public Resources Code section 30600. We grant the request for judicial notice as to the existence of these documents. (Evid. Code, §§ 452, subd. (d), 459.) We cannot take judicial notice of their meaning, however. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113.)

accommodations were not feasible, and did not provide sufficient mitigation for the loss of lower-cost accommodations; and (2) the high cost of parking at the hotel did not increase the supply of public parking in the coastal zone.

The trial court also rejected Sunshine Enterprises' argument that its permit application should be deemed approved because the Commission set the hearing on a date Sunshine Enterprises did not agree to and refused its request to further postpone the hearing as a matter of right. The trial court found that Government Code section 65957 required that the parties mutually agree in writing to an extension, and that the Commission had not agreed to set the hearing on any particular date. The trial court also found that Sunshine Enterprises could not satisfy the requirements under the Commission's regulations for a further postponement as of right.

DISCUSSION

I. The California Coastal Act

The California Coastal Act of 1976 (Coastal Act; Pub. Resources Code, § 30000 et seq.) is the legislative continuation of the coastal protection efforts that began when Californians enacted Proposition 20, which created the Commission. (See *Ibarra v. California Coastal Com.* (1986) 182 Cal.App.3d 687, 693.) One of the primary purposes of the Coastal Act is avoiding the harmful consequences of development of coastal resources. (See Pub. Resources Code, § 30001.) The Coastal Act must be liberally construed to accomplish its purposes and objectives. (*Id.*, § 30009.)

The Coastal Act's goals are binding on both the Commission and local government and include: (1) maximizing, expanding and maintaining public access (Pub. Resources Code, §§ 30210-30214); (2) expanding and protecting public recreation opportunities (*id*., §§ 30220-30224); (3) protecting and enhancing marine resources (*id*., §§ 30230-30236); and (4) protecting and enhancing land resources (*id*., §§ 30240-30244). A fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government. (See *Charles A. Pratt Construction Co., Inc. v. California Coastal Com*. (2008) 162 Cal.App.4th 1068, 1075.) As a result, the Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the Coastal Act. (*Ibid*.)

The heart of the Coastal Act is the requirement that a party must obtain a coastal development permit prior to undertaking development within the coastal zone. (Pub. Resources Code, § 30600.) Before it can approve a project, the Commission must find that the project, as conditioned, is consistent with the applicable policies of Chapter 3 of the Coastal Act as well as the applicable requirements of CEQA, the California Environmental Quality Act (*id*., § 21000 et seq.). The Commission acts in a quasi-judicial capacity when reviewing a coastal development permit application. (See *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 177 ["courts have uniformly held that the coastal permit process is adjudicatory"].) A party may seek after-the-fact permit approval if development occurs without a permit. (See, e.g., *LT-WR, L.L.C. v. California Coastal Com*. (2007) 152 Cal.App.4th 770, 794-795.) Based on the evidence before it, the Commission may grant, deny or otherwise

condition the development based on all applicable Coastal Act policies. (See *ibid*.)

II. Standard of Review

Our role in reviewing Commission decisions is to determine " 'whether (1) the [Commission] proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the [Commission] abused its discretion.' [Citations.]" (*Ross v. California Coastal Com*. (2011) 199 Cal.App.4th 900, 921.) The Commission abuses its discretion if it does not proceed in the manner required by law, its order or decision is not supported by the findings, or its findings are not supported by substantial evidence. (*Ibid*.) In determining whether the Commission's findings are supported by substantial evidence, we examine the whole record and consider all relevant evidence, including evidence detracting from the Commission's decision. While we engage in some weighing to fairly estimate the worth of the evidence, we do not conduct an independent review of the record where we substitute our own findings and inferences for the Commission. It is the Commission's role to weigh the preponderance of conflicting evidence and we may reverse the Commission's decision only if no reasonable person could have reached the same conclusion based on the same evidence. (*Id*. at pp. 921-922.)

Lastly, while appellate courts review questions of law de novo, the Commission's interpretation of the statutes and regulations under which it operates is entitled to great weight, given the Commission's special familiarity with the regulatory and legal issues. (*Ross v. California Coastal Com*., *supra*, 199 Cal.App.4th at p. 938 ["Courts must defer to an administrative

agency's interpretation of a statute or regulation involving its area of expertise unless the challenged construction contradicts the clear language and purpose of the interpreted provision"].)

III. Merits

A. *Public Resources Code Section 30612*

Public Resources Code section 30612 provides that: "An application for a coastal development permit to demolish a structure shall not be denied unless the agency authorized to issue that permit . . . finds, based on a preponderance of the evidence, that retention of that structure is feasible." Relying upon section 30612, Sunshine Enterprises first contends that the Commission failed to determine the feasibility of retaining the "existing deteriorated buildings." However, the statute does not require that the Commission determine the feasibility of retaining a structure when a permit applicant—such as Sunshine Enterprises—seeks not just to demolish a structure, but to replace the structure with new development.[8]

Nevertheless, according to Sunshine Enterprises, the Commission abused its discretion by not determining the feasibility of retaining the two low-cost motels under Public Resources Code section 30612. However, Sunshine Enterprises did not apply for prospective authorization to demolish existing structures. Instead, Sunshine Enterprises applied for after-the-fact approval of demolition that had already occurred. Given that the motels no longer existed, the Commission would have

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[8] Of course, when Sunshine Enterprises applied for an after-the-fact permit, the allegedly deteriorated buildings were no longer "existing"—they had been demolished five years earlier.

difficulty evaluating whether the retention of the motels was feasible. Under these circumstances, evaluating the feasibility of retaining the demolished motels would have been a futile and an idle act, which the law does not require. (See Civ. Code, §§ 3531, 3532.)

Furthermore, Sunshine Enterprises did not apply only to demolish the motels; it also sought to replace the motels with a new luxury boutique hotel. Thus, Public Resources Code section 30612, which, by its plain language, applies only to demolition permits, is inapplicable here. Sunshine Enterprises cites no authority to the contrary. Indeed, as the trial court determined: "[Sunshine Enterprises] provides no authority that a permit with a dual purpose—demolition and construction—must meet the feasibility requirement of [Public Resources Code] section 30612." Sunshine Enterprises' argument also contradicts the Commission's interpretation of Public Resources Code section 30612—an interpretation that is entitled to deference under our standard of review. (See *Ross v. California Coastal Com.*, *supra*, 199 Cal.App.4th at p. 938.)

Sunshine Enterprises next argues that because the Commission's regulations require that "functionally related development" be the subject of a single permit application, not analyzing the feasibility of retention whenever an application includes demolition of an existing structure would effectively render Public Resources Code section 30612 a "nullity."[9]

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[9] The applicable regulation provides that: "To the maximum extent feasible, functionally related developments to be performed by the same applicant shall be the subject of a single permit application. The executive director shall not accept for filing a second application for development which is the

According to Sunshine Enterprises, this is because, "in urban locations, demolition and construction will be considered together." Sunshine Enterprises provides no authority for this proposition, however. Moreover, the applicable regulation does not prevent an applicant from seeking approval of a permit solely for demolition.[10] (See Cal. Code Regs., tit. 14, § 13053.4, subd. (a).)

We also note that Sunshine Enterprises did not raise the applicability of Public Resources Code section 30612 when submitting its after-the-fact permit application in August 2014 or during the public hearing on its permit application in September 2015, at which time the Commission voted to deny the application. In February 2016, the Commission held a hearing to consider revised findings proposed by staff in support of its decision to deny the permit application. Sunshine Enterprises objected to the proposed revised findings, and, in so doing, cited Public Resources Code section 30612 for the first time. The Commission overruled Sunshine Enterprises' objections and adopted the findings. Notably, however, the sole purpose of a revised findings hearing is to "address whether the proposed revised findings reflect the action of the commission." (Cal. Code

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subject of a permit application already pending before the commission." (Cal. Code Regs., tit. 14, § 13053.4, subd. (a).)

[10] As discussed above, Sunshine Enterprises would have been ineligible for a demolition-only permit, given that it had already demolished the motels and replaced them with the Shore Hotel when applying for an after-the-fact permit. Because Sunshine Enterprises did not apply for a permit solely to demolish the motels but also to replace them with the Shore Hotel, Public Resources Code section 30612 does not apply.

Regs., tit. 14, § 13096, subd. (c).) Such a hearing does not provide an applicant the opportunity to re-argue its permit application or for the Commission to reconsider its permitting decision. (See *ibid*.) Thus, Sunshine Enterprises failed to raise section 30612 at a time when the Commission could consider it. Therefore, Sunshine Enterprises failed to exhaust its administrative remedies on this issue.

When a statute provides an adequate administrative remedy, courts lack jurisdiction to consider the issue until the petitioner exhausts that administrative process. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 55-56.) Failure to exhaust available administrative remedies deprives a court of jurisdiction to act until those remedies are exhausted. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-292.) The exhaustion doctrine applies to review of the Commission's actions.[11] (*Walter H. Leimert Co. v. California Coastal Com.* (1983) 149 Cal.App.3d 222, 232.) Furthermore, courts have frequently used the Commission's interpretation as an aid in statutory construction. (See, e.g., *Reddell v. California Coastal Com.* (2009) 180 Cal.App.4th 956, 965; *La Fe, Inc. v. County of Los Angeles* (1999) 73 Cal.App.4th 231, 240.) As noted by the Commission, such deference is especially important here given that no published case has ever interpreted Public Resources Code section 30612 in

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[11] Although questions of law alone do not require exhaustion (*Griswold v. Mt. Diablo Unified Sch. Dist.* (1976) 63 Cal.App.3d 648, 653), the Commission's consideration of the issue here would involve questions of fact, specifically, whether Public Resources Code section 30612 should apply to Sunshine Enterprises' after-the-fact permit application and, if so, whether retention of the two low-cost motels was feasible.

the manner Sunshine Enterprises advocates here. The question as to whether Public Resources Code section 30612 applies to all permit applications, or if the statute should be limited to demolition-only permits, should be addressed by the Commission in the first instance.[12]

B. *Mitigation Fees*

Sunshine Enterprises also argues that the Commission may not impose conditions such as fees to mitigate the impacts of that demolition, as such conditions would lack a "nexus" between the mitigation fees and the demolition permit.[13] Sunshine Enterprises provides no authority for this proposition. Furthermore, the Commission may, in fact, impose conditions in order to mitigate the impacts of demolition. For example, the Commission may condition demolition so that it does not disturb

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[12] Thus, we need not reach the Commission's alternative argument that even if Public Resources Code section 30612 were to apply, Sunshine Enterprises would be equitably estopped from requiring the Commission to determine feasibility after-the-fact.

[13] See *Nollan v. California Coastal Com'n* (1987) 483 U.S. 825 [107 S.Ct. 3141, 97 L.Ed.2d 677] (*Nollan*), which examined the appropriate analytical framework for assessing whether a government-imposed requirement for developing property is a taking. *Nollan* held that a required dedication of a public easement across private property to obtain a building permit was a taking. (*Id.* at p. 831.) The mandated easement meant "a 'permanent physical occupation' has occurred," thereby triggering the right to just compensation. (*Id.* at p. 832.) *Nollan* found the "essential nexus" between " 'legitimate state interests' " and the required easement, which might have removed the requirement from a takings analysis, was lacking. (*Id.* at p. 837.)

environmentally sensitive habitats (Pub. Resources Code, § 30240); or does not result in geologic hazards (*id*., § 30253); or does not interfere with coastal access (*id*., § 30211). Here, it is undisputed that the demolished motels were low-cost and that demolishing them removed low-cost accommodations from the coastal zone. Thus, the Commission may lawfully place conditions on a demolition permit to mitigate the demolition's impacts on coastal access, i.e., the removal of low-cost accommodations on the coast.

Sunshine Enterprises' citation to *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072 in support of its argument is inapt. In *Bullock*, the plaintiff bought a condemned San Francisco hotel and spent a substantial amount of money renovating it for transient (i.e. tourist) occupancy. During renovation, the city adopted an ordinance that required owners of residential hotel units to obtain a permit from the city before converting the property to any other use. (*Id*. at pp. 1080-1081.) The hotel owner sought an exemption from the new ordinance, which the city denied. (*Id*. at p. 1081.) Years of litigation followed. After discovering that the hotel was being operated as a tourist hotel without the required permit or exemption, the city sought a preliminary injunction to restrain the owner from operating the property as a tourist hotel. (*Id*. at p. 1083.) The hotel owner then invoked the Ellis Act, declaring his intention to exit the rental market altogether.[14] (*Id*. at

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[14] The Ellis Act provides, in relevant part, that "[n]o public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to

pp. 1083-1084.) The trial court granted the injunction, and the owner appealed. (*Id*. at p. 1085.) The Court of Appeal reversed, holding that the Ellis Act preempted a crucial provision of the ordinance, and that, having properly invoked the Ellis Act, the hotel owner was entitled to quit the business of providing residential rental units. (*Id.* at p. 1095.) Here, the Commission is not forcing Sunshine Enterprises to remain in business. Nor is it forcing Sunshine Enterprises to operate a low-cost hotel, as in *Bullock*. Therefore, *Bullock* is inapplicable here.

C. *Public Resources Code Section 30213*

Public Resources Code section 30213 provides that the Commission "shall not: (1) require that overnight room rentals be fixed at an amount certain for any privately owned and operated hotel, motel, or other similar visitor-serving facility located on either public or private lands; or (2) establish or approve any method for the identification of low or moderate income persons for the purpose of determining eligibility for overnight room rentals in any such facilities."

According to Sunshine Enterprises, the Commission's permit denial was a de facto attempt to set room rates for the Shore Hotel in violation of Public Resources Code section 30213. However, Sunshine Enterprises cites no legal authority for this proposition. Furthermore, although the Commission denied Sunshine Enterprises' application for after-the-fact approval of a luxury hotel, that denial did not fix room rates "at an amount certain." Nor did the Commission preclude Sunshine Enterprises

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offer, or to continue to offer, accommodations in the property for rent or lease . . . ." (Gov. Code, § 7060, subd. (a).)

from seeking future approval for its hotel, as long as it provided adequate mitigation for the hotel's impact on coastal access.[15] Although Sunshine Enterprises contends that the Commission's focus on room rates demonstrates that the Commission denied its permit application because it objected to the amount the Shore Hotel charged for a room, the Commission unarguably cited the room rates to show that the hotel was not low-cost, which therefore justified a mitigation fee.

Sunshine Enterprises also argues that the Commission's denial of an after-the-fact permit was based on its objection to the proposed in-lieu fee. According to Sunshine Enterprises, this was tantamount to a demand for money under *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595 [133 S.Ct. 2586, 186 L.Ed.2d 697] (*Koontz*). In *Koontz*, the Supreme Court held that the government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." (*Id.* at pp. 605-606, citing *Nollan*, *supra*, 483 U.S. at p. 837 and *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391 [114 S.Ct. 2309, 129 L.Ed.2d 304] (*Dolan*).) As discussed above, however, the Commission did not condition permit approval on the dedication of property. In other words, the Commission did not require that Sunshine Enterprises give up a property interest for which the government would have been required to pay just

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[15] Courts have upheld a condition to a coastal development permit that required an applicant to pay money to mitigate for the loss of coastal access. (See, e.g., *Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 237.)

compensation under the takings clause outside of the permit process. Nor did the Commission require Sunshine Enterprises to dedicate any portion of its property to the public or to pay any money to the public. (See *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 461 (*California Building Industry*).)

In *Koontz*, a property owner sought a permit from the local water district to develop a portion of his Florida property and agreed to deed a conservation easement to the district on the remainder of the property. (*Koontz*, *supra*, 570 U.S. at p. 601.) Believing that the proposed development would destroy wetlands on the property, the water district told the property owner that it would not issue a permit unless he agreed to either reduce the size of his development or pay a mitigation fee to enhance wetlands elsewhere. (*Id*. at pp. 601-602.) The property owner filed suit. (*Id*. at p. 602.) The Florida Supreme Court found that *Nollan* and *Dolan* did not apply because the water district did not approve the property owner's permit application on the condition that he comply with the water district's demands. Instead, the district denied the property owner's application because he refused to make concessions. (*Id*. at p. 603.) The Supreme Court reversed, holding that "[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so." (*Id*. at p. 606, italics omitted.)

Nollan and *Dolan* establish that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a " 'nexus' " and " 'rough proportionality' " between the

government's demand and the effects of the proposed land use. (*Koontz*, *supra*, 570 U.S. at pp. 605-606.) *Koontz* extended the *Nollan*/*Dolan* test to apply to government demands for money as a condition for a land-use permit. (*Id.* at p. 612.) "[S]o-called 'in lieu of' fees are utterly commonplace . . . and they are functionally equivalent to other types of land use exactions." (*Ibid.*) Accordingly, the Supreme Court concluded that they too must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*. (*Ibid.*) But the court also agreed that "so long as a permitting authority offers the landowner at least one alternative [to the money condition] that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." (*Id.* at p. 611.)

Since *Koontz*, California courts have addressed the applicability of the opinion to in lieu fees. In *California Building Industry*, for example, our state Supreme Court considered a housing ordinance requiring 15 percent of all residential developments of 20 or more units to be made available at an affordable cost. (*California Building Industry*, *supra*, 61 Cal.4th at pp. 449-450.) The city provided residential developers with "a menu of options from which to select alternatives" to complying with the requirement, including an option of paying an in-lieu fee based on the median sales price of a housing unit affordable to a moderate-income family. (*Ibid.*) A developer sued to invalidate the ordinance, contending that under the unconstitutional conditions doctrine, as well as *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643 (*San Remo Hotel)*, the city was required to demonstrate a reasonable relationship between any adverse public impacts caused by the new residential units and the exactions and conditions imposed on

developers. (*California Building Industry*, *supra*, at pp. 443, 452-453.)

Our Supreme Court held that the unconstitutional conditions doctrine was inapplicable because the ordinance did not impose an exaction on the developer's property within the meaning of the takings clauses of the federal and California Constitutions. (*California Building Industry*, *supra*, 61 Cal.4th at pp. 443-444.) The court found that the ordinance did not require a developer to "give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." (*Id*. at p. 461.) Instead, the 15 percent set-aside requirement "simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale. . . . [¶] Rather than being an exaction, the ordinance falls within . . . municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." (*Ibid*.) Such land use restrictions, enacted under the government's "general police power[ ] to regulate the development and use of real property within its jurisdiction to promote the public welfare" are constitutionally permissible so long as they "bear[] a reasonable relationship to the public welfare." (*Id*. at p. 455.) The court noted that "[n]othing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval." (*Id*. at p. 460.) Therefore, the court held, "the

affordable housing requirement of the San Jose ordinance as a whole—including the voluntary off-site options and in lieu fee that the ordinance makes available to a developer—does not impose an unconstitutional condition in violation of the takings clause." (*Id*. at pp. 468-469.) "No developer is required to pay the in lieu fee and may always opt to satisfy the ordinance by providing on-site affordable housing units." (*Id*. at p. 476.)

In so holding, the court rejected the developer's reliance on *San Remo Hotel*, which involved a challenge to a land use restriction requiring property owners seeking to convert long-term rental units to short-term units to provide a comparable number of long-term rental units at another location or pay an in-lieu fee. (*San Remo Hotel*, *supra*, 27 Cal.4th at p. 651.) In *San Remo Hotel*, the court had held that the challenged fee was valid because it was reasonably related to mitigating the impact caused by the proposed conversion of long-term rental housing to short-term rentals. (*Id*. at pp. 672-679.) Citing the "reasonably related" language, the developer in *California Building Industry* argued that the housing requirements must also "satisfy something similar to the *Nollan/Dolan* test." (*California Building Industry*, *supra*, 61 Cal.4th at pp. 469-470.) But the court held that the cited portion of *San Remo Hotel* "applies only to 'development mitigation fees' [citation]—that is, to fees whose purpose is to mitigate the effects or impacts of the development on which the fee is imposed—and does not purport to apply to price controls or other land use restrictions that serve a broader constitutionally permissible purpose or purposes unrelated to the impact of the proposed development." (*Id*. at p. 472, italics omitted.) In contrast to the development-mitigation fee at issue in *San Remo Hotel*, San Jose's housing ordinance was intended to

"advance purposes beyond mitigating the impacts or effects that are attributable to a particular development or project and instead 'to produce a widespread public benefit' [citation] that inures generally to the municipality as a whole . . . ." (*Id.* at p. 474.)

Notably, in 2016, this court decided *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621. There, a developer applied to the city for permits to demolish two single-family homes and build an 11-unit condominium complex in their place. (*Id.* at p. 624.) The city determined that the project fell under a housing ordinance that required developers to sell or rent a portion of newly constructed units at below-market rates or pay an in-lieu fee "designed to fund construction of the equivalent number of units the developer would have otherwise been required to set aside." (*Id.* at p. 624-625.) Although the city approved the application in 2005, by the time the developer sought building permits in 2011, the in-lieu fee had nearly doubled. (*Id.* at p. 625.) The developer paid the fee under protest and sued the city, arguing that the in-lieu fee was an unconstitutional condition under *Nollan* and *Dolan*. (*Id.* at pp. 625-626.)

Applying *California Building Industry*, we held that *Nollan* and *Dolan* were not implicated because the developer "paid the in-lieu fee voluntarily as an alternative to setting aside a number of units." (*616 Croft Ave., LLC v. City of West Hollywood*, *supra*, 3 Cal.App.5th at pp. 628-629, italics omitted.) We further held that the in-lieu fee was not subject to the Mitigation Fee Act because the fee's purpose was not to mitigate any adverse impact of the new development, and the fee was part of a land use

regulation that broadly applied the nondiscretionary fees to a class of owners.[16] (See *id.* at p. 629.)

Here, the Commission did not deny Sunshine Enterprises' permit application based on its refusal to accept a condition, i.e., pay a mitigation fee. As noted by the trial court, Sunshine Enterprises was attempting to blur the distinction between the Commission staff's mitigation fee recommendation and the Commission's ultimate decision. Indeed, nowhere in its analysis did the Commission state it would approve the permit if Sunshine Enterprises paid an appropriately calculated mitigation fee. Instead, the trial court said, the Commission denied the permit application as inconsistent with the Coastal Act.[17] Thus,

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[16] The Mitigation Fee Act applies when "a monetary exaction other than a tax or special assessment . . . is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project." (Gov. Code, § 66000, subd. (b).)

[17] The trial court expressly observed: "While the Commission accepted the concept of a mitigation fee, it concluded that the Staff Report's mitigation fee calculation was unworkable. Nowhere in its Revised Findings analysis did the Commission state that it would approve [the permit application] if [Sunshine Enterprises] paid an appropriately calculated mitigation fee. Instead, the Revised Findings clearly stated that [Sunshine Enterprises'] application is not consistent with [Public Resources Code] section 30213, which requires lower cost . . . overnight accommodations to be protected, encouraged, and provided where feasible. The Project did not provide lower cost overnight accommodations, did not provide evidence that such lower cost accommodations were not feasible, and did not provide sufficient mitigation for the loss of the lower cost accommodations. . . .

Koontz is inapplicable here.[18] As noted by the Commission, applying *Koontz* to the Commission's denial in this case would expand the reach of regulatory takings beyond established Supreme Court precedent.

Lastly, Sunshine Enterprises argues that the Commission's findings do not support its decision to deny the permit application because the Commission did not determine the appropriate mitigation fee. Instead, it simply denied the application. However, Division Three of this court rejected this argument in *LT-WR, L.L.C. v. California Coastal Com.*, *supra*, 152 Cal.App.4th 770. There, as here, the applicant complained that "rather than denying the application, the Commission should have approved the application, subject to appropriate conditions of approval." (*Id.* at p. 801.) The Court of Appeal rejected that

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Moreover, even if an appropriate fee could be calculated, [Sunshine Enterprises] stated that it would not pay it. Therefore, the Project could not be carried out successfully and [the permit application] was denied." According to the trial court, because the Commission properly determined that Sunshine Enterprises' permit application did not satisfy Public Resources Code section 30213, and denied the application on that basis, *Koontz* did not apply.

[18] Consequently, we need not reach the Commission's alternative argument that, even if *Koontz* applies, substantial evidence supports the conclusion that: (1) the Commission had a legitimate interest in mitigating the loss of lower-cost accommodations in the coastal zone; (2) there is an "essential nexus" between Sunshine Enterprises' demolition of the two low-cost motels and the payment of an in-lieu fee to replace the demolished motel rooms; and (3) mitigation via an in-lieu fee is "roughly proportional" to the Shore Hotel's impacts on lower-cost accommodations.

reasoning, instead finding "the Commission is not required to redesign an applicant's project to make it acceptable." (*Ibid*.)

D. *Alleged Due Process Violation*

Again relying on *Koontz*, Sunshine Enterprises contends that the denial of its permit application amounts to a denial of due process. According to Sunshine Enterprises, denying a permit application because an applicant objects to a condition puts "coercive pressure" on the applicant to agree to the condition. (See *Koontz*, *supra*, 570 U.S. at p. 607.) Furthermore, Sunshine Enterprises argues, "when the Commission suppresses objections under threat of denial, the Commission then prevents a party from exhausting its administrative remedies, and thereby, access to the courts."

We first note that Sunshine Enterprises does not identify a condition it agreed to only after the Commission exerted "coercive pressure." Nor does Sunshine Enterprises identify the objection allegedly suppressed by the Commission's threat of denial. Although, as discussed above, Sunshine Enterprises in fact failed to object pursuant to Public Resources Code section 30612 at a time when the Commission could consider the objection, there is no evidence that this failure was caused by the Commission's allegedly coercive conduct.

We next note that, under Sunshine Enterprises' reasoning, the Commission could never deny a permit application, or even place a condition on a permit, because doing so would constitute "coercive pressure" in violation of the applicant's right to due process. But that is not the holding of *Koontz*. Instead, *Koontz* notes that "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional

right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." (*Koontz*, *supra*, 570 U.S. at p. 606.) In other words, *Koontz* guarantees judicial review to prevent the government from coercively withholding benefits from those who exercise their constitutional rights. *Koontz* protects Sunshine Enterprises' right to challenge the Commission's permit denial, a right that Sunshine Enterprises has exercised by filing its appeal here.

E. *The Permit Streamlining Act*

Lastly, Sunshine Enterprises contends that its permit application should be "deemed approved" under the Permit Streamlining Act. The Permit Streamlining Act requires that a public agency act upon a permit application within 180 days after the application is determined complete by the agency, allowing up to one 90-day extension, for a total time to act of not more than 270 days. (Gov. Code, §§ 65952, 65957.) "In the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required . . . the failure to act shall be deemed approval of the permit application for the development project" provided that "public notice required by law has occurred." (*Id*., § 65956, subd. (b).)

Sunshine Enterprises does not contend that the Commission failed to act within the Permit Streamlining Act's time limits. Instead, Sunshine Enterprises argues that its application should be deemed approved as of July 11, 2015 or August 15, 2015, because the Commission did not set the hearing on its application for those months, as Sunshine Enterprises had requested. In the alternative, Sunshine Enterprises argues that

its application should be deemed approved as of October 3, 2015, when the Commission did not give Sunshine Enterprises an opportunity to postpone the hearing further.

At the Commission's request, Sunshine Enterprises and the Commission signed an agreement to extend the time limits under Government Code section 65952 by 90 days. According to Sunshine Enterprises, it agreed to that 90-day continuance on condition that the Commission set the rescheduled hearing for July 2015 or August 2015, but the Commission instead rescheduled the hearing for September 2015. However, the parties' signed agreement contained no such condition. Although Sunshine Enterprises did send a contemporaneous email that purportedly conditioned the extension to July 2015 or August 2015, Government Code section 65957 requires that the applicant and public agency mutually agree in writing to the extension.[19] Sunshine Enterprises does not provide a record citation demonstrating that the Commission agreed to Sunshine Enterprises' condition.

Furthermore, Government Code section 65956, subdivision (b), precludes deemed approval without "public notice required by law." The applicant may provide the public notice, as

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[19] As noted above, the time limit in Government Code section 65952 "may be extended once upon mutual written agreement of the project applicant and the public agency for a period not to exceed 90 days from the date of the extension." (Gov. Code, § 65957.) No other extension, continuance, or waiver of these time limits either by the project applicant or the lead agency is permitted, except as provided in this section or Government Code section 65950.1, which is not relevant here. (See *ibid.*)

long as it gives seven days' advance notice to the agency of its intent to do so. (*Id*., § 65956, subd. (b); see *Ciani v. San Diego Trust & Savings Bank* (1991) 233 Cal.App.3d 1604, 1609.) Sunshine Enterprises does not provide a record citation demonstrating that public notice "warning of the potential for deemed approval" was given by either the Commission or Sunshine Enterprises before the July 2015 or August 2015 Commission meetings.

Sunshine Enterprises also contends that it should have been allowed an additional postponement as " 'a matter of right.' "[20] However, pursuant to Government Code section 65957, the parties agreed to extend the total period for Commission action by no more than 270 days. Furthermore, "[a]ny request for postponement pursuant to [California Code of Regulations., title 14, section 13073, subdivision (a)] . . . shall include a waiver of any applicable time limits for commission action on the application." (Cal. Code Regs., tit. 14, § 13073, subd. (c).) Given that Sunshine Enterprises could not unilaterally waive the time

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[20] In so arguing, Sunshine Enterprises relies on California Code of Regulations, title 14, section 13073, subdivision (a), which provides: "Where an applicant for a coastal development permit determines that he or she is not prepared to respond to the staff recommendation at the meeting for which the vote on the application is scheduled, the applicant shall have one right, pursuant to this section, to postpone the vote to a subsequent meeting. The applicant's right to postpone shall be exercised prior to commencement of the public testimony portion of the public hearing."

limits of the Permit Streamlining Act, it could not postpone the hearing any further.[21]

DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

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[21] Indeed, according to the transcript of the hearing, Sunshine Enterprises waived any right to hold the hearing at a later date. When the Commission's chair asked counsel for Sunshine Enterprises if he wanted to withdraw the application and reapply if the Commission waived the re-filing fees, counsel responded, "I decline it, we've prepared as best we can for today. And we will proceed."

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.